

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 15, 2010

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of JOSE A. CHAPARRO ,	:	Docket No. SE 2010-295-DM
Complainant,	:	
	:	
v.	:	
	:	
COMUNIDAD AGRICOLA	:	Mine ID 54-00350
BIANCHI, INC.,	:	CAB Aggregates
Respondent	:	

DENIAL OF MOTION TO ISSUE ORDER TO SHOW CAUSE

In December 2009, the Secretary of Labor, appearing on behalf of Jose A. Chaparro, filed an application to reinstate Mr. Chaparro to the position he held with Comunidad Agricola Bianchi, Inc. (CAB), as of the date the Secretary alleged Mr. Chaparro was illegally laid off. Following a hearing, I granted the application and issued a decision and order reinstating Mr. Chaparro to “the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same benefits to which he was then entitled.” 32 FMSHRC 206, 211 (February 2010). Although the order and decision settled the issues raised in the application, I retained jurisdiction over the reinstatement. Subsequently, the Secretary filed a complaint of discrimination on Mr. Chaparro’s behalf (SE 2010-434-DM). Counsels and I agreed that a hearing on the merits of the discrimination complaint would begin on August 10, 2010.

On April 30, 2010, the Secretary filed a motion in the temporary reinstatement case (Docket No. SE 295-DM) requesting that I issue an order requiring CAB to show cause why Mr. Chaparro had not been reinstated consistent with the February 22, 2010 Order. The Secretary pointed out that at the reinstatement hearing, Mr. Chaparro testified that he worked in heavy equipment maintenance and that his duties were “[c]heck[ing] the oil on the machinery, oil and filter changes, greasing the machinery” and “washing [the equipment] with the . . . pressure washer.” (Mot. 2, *citing* Tr. 16.) The Secretary also pointed out that the company administrator, Reynat Jimenez, testified that Mr. Chaparro’s duties included being “in charge of cleaning floors, the workshop, the tools, maintaining all the heavy equipment, cleaning the green areas, collecting used oil, washing heavy equipment, and everything related to maintenance at . . . CAB.” (Tr.

74.) Reynat Jimenez also testified that Chaparro had to provide maintenance to a sand screener, a piece of equipment that was not in the shop, but rather “in the field” and to a drag line, another piece of equipment that was “in the field.” (Tr. 96.)

The Secretary asserted that although CAB had reinstated Mr. Chaparro, his duties were inconsistent with those described at the hearing. (Mot. 2.) The Secretary attached to the motion a signed declaration of MSHA Inspector Isaac E. Villahermosa in which the inspector declared that upon receiving a complaint (presumably from Mr. Chaparro), the inspector visited CAB’s facility in April 2010. The inspector stated that he found:

- a) CAB had reinstated Mr. Chaparro to a position other than that which he held on August 14, 2009 or its equivalent.
- b) Mr. Chaparro’s duties and responsibilities as of April 28, 2010 differed from those he performed on August 14, 2009, and were performed under arduous conditions.
- c) As of April 28, 2010 CAB was selectively enforcing work rules against Mr. Chaparro.

Villahermosa Decl. 2.

Following receipt of the motion, counsels and I conferred via a conferenced telephone call, and counsel for CAB expressed his opinion that the duties to which Mr. Chaparro was assigned were not outside his prior maintenance duties. He also requested additional time to respond to the motion, a request that was granted with the concurrence of counsels for the Secretary.

Counsel for CAB responded on May 10. He noted that the motion “does not state the specific actions that . . . [CAB] has taken or failed to take in relation to the . . . order.” (Reply 2.) He went on to state that the mine is small in terms of manpower, and in terms of product (sand) sold and delivered to clients’ trucks. Mr. Chaparro is one of five employees who work at the mine: three heavy equipment operators, one chief mechanic and Mr. Chaparro who works in general maintenance, which “includes the mechanic shop and the surroundings.” (Reply 3.) According to counsel, Mr. Chaparro “is doing what he had done during the 45 days that he worked with . . . [CAB] before he was notified his employment [was] terminated” and that he “is only doing the functions that he was doing prior to August 14, 2010.” *Id.* Further, “even though all other employees have to do their primary works [*sic.*] every employee, works where he is needed, [and] if the heavy equipment operators have to work in the mechanic shop because the mechanic did [not] show up for work, if he has the knowledge that employee will perform those duties.” *Id.* at 3-4. CAB maintains that in fact, “Mr. Chaparro is doing less work than the other employees and only performing the duties that were stated or testified in the hearing of this case on February 2, 2010.” *Id.* at 4.

CAB attached to its response sworn statements from Frankie Rosado Perez, a CAB

mechanic and machine operator, Israel Gonzalez Tirado, an apparent employee of CAB, Jose Heriberto Rodriguez Valentin, a heavy equipment operator, Hipolito Polanco Ramirez, a loader operator and Reynat Jimenez, the administrator of CAB. In general the statements maintain that none of the persons have seen Mr. Chaparro abused or treated with disrespect. In addition, Reynat Jimenez states that “usually [Mr. Chaparro] stays cleaning in the shop, that [the shop is] in a covered area[,] while the other employees work in the sun”, but that “[i]f he is required to leave the shop it would be an exception, and the work required should be done in a couple of hours.” (Jimenez Sworn Statement 2.) Reynat Jimenez goes on to state that if Mr. Chaparro is not available to work, other employees must perform his duties. *Id.*

CAB also supplemented its response by submitted a sworn statement from Manuel Menendez-Marin, the president of CAB. Mr. Menendez-Marin stated that low production due to dramatically declining sales has resulted in “everyone lending a hand to the other employee if he or she cannot work or for some reason, the others have to help.” (Menendez-Marin Sworn Statement 1-2.) He further stated that Mr. Chaparro “isn’t the only employee in the mine, there are five other employees who have to cover for those who do not show up for work or are doing other tasks. Mr. Chaparro[’s] primary job is maintenance of the [machines] and green areas. He usually works in the shop [and] all others employees work under the sun. When he is required to perform work in other areas it’s for a short time.” *Id.* at 3.

On the same day the Commission received Menendez-Marin’s sworn statement, Counsel for the Secretary objected to the statements and complained that they did not address “the Secretary’s underlying allegations . . . that Mr. Chaparro has been reinstated to work exclusively on tasks that are different and more arduous than those which he performed prior to reinstatement” and that because the statements were written in English and the persons making the statements were primarily or solely conversant in Spanish, the statements should be given no weight. (Sec’y Letter in Response to Resp’t Reply to Mot. for Order to Show Cause (May 11, 2010).)

RULING ON MOTION

The Secretary asks that I issue an order requiring CAB to show why Mr. Chaparro has not been reinstated consistent with the terms of my order of February 22, 2010, (Motion for Order to Show Cause at 3), which required that he be reinstated “to the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled.” 23 FMSHRC at 211. The Secretary is not asserting CAB has failed to reinstate Mr. Chaparro. He is back at work and CAB has complied with that part of the order. Rather, the Secretary is asserting Mr. Chaparro has not returned to the same or to an equivalent position because he has not been given the same duties he held previously. *See Villahermosa Decl.* at 2.

As noted above, the record at the reinstatement proceeding revealed that Mr. Chaparro’s position on August 14, 2009, was that of a maintenance worker. I conclude from the statements

submitted by CAB that he has been reinstated to that position. It is really the specific duties to which he has been assigned that are the subject of the motion. The problem with the motion is that it asks the Commission to venture into an area and to make judgements on an issue the Commission is particularly ill equipped to decide at this point in this proceeding – the validity of specific work assignments given to Mr. Chaparro in his capacity as a maintenance worker for CAB.

It is true that the company has lost some of its freedom to direct its work force consistent with its business needs, in that it has been required to reinstate Mr. Chaparro and to return him to the same position he held as of August 14, 2009. However, the company has met this requirement. The question of whether or not the duties he is assigned are consistent with the position to which he has been returned must be tested not only against the duties he held prior to August 14, 2009, but also against the current duties required of all maintenance workers, because the company has not lost its freedom to direct its workforce consistent with its needs as they have evolved since Chaparro's reinstatement.

The Secretary essentially maintains that the duties are different and are performed under arduous conditions. CAB essentially maintains that Chaparro is continuing to work as he did prior to August 14, 2009, with the caveat that if he is required to do other duties, they are those required of other maintenance workers given the evolving state of its business and workforce. The Commission's judges cannot act as uber-managers of a company by substituting their business judgements for those of a company's managers with regard to every work assignment given to an employee. The company has been ordered to reinstate Mr. Chaparro to the same or to an equivalent position, and it has done so. If in fact the duties Mr. Chaparro has been required to undertake are more arduous and less desirable than those assigned other maintenance workers, and if they have been given because Mr. Chaparro engaged in activity protected under the Act, they may, as the Secretary points out, give rise to a claim of discrimination. *See Secy's Letter* (May 11, 2010). They do not, however, serve as a basis for issuing an order requiring the company to show cause why it is not complying with a previously issued order.

For these reasons, the Motion for an Order to Show Cause **IS DENIED**.

David Barbour
Administrative Law Judge

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